UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
LAS VEGAS DIVISION

ORACLE USA, INC., ET AL.,	**CASE NO: 2:10-CV-00106-LRH-PAL**
Plaintiffs,	**CIVIL**
vs.	**Las Vegas, Nevada**
RIMINI STREET, INC., ET AL.,	**Tuesday, July 3, 2012**
Defendants.	**(9:31 a.m. to 9:58 a.m.)**

MOTION HEARING

BEFORE THE HONORABLE PEGGY A. LEEN,
UNITED STATES MAGISTRATE JUDGE

Appearances:	**See Next Page**
Court Reporter:	**Recorded; FTR**
Courtroom Administrator:	**Jeff Miller**
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APPEARANCES FOR:

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Defendants:	**W. WEST ALLEN, ESQ.** **Lewis & Roca** **3993 Howard Hughes Parkway** **Suite 600** **Las Vegas, NV 89169**
Interested Party, CedarCrestone, Inc.:	**DOMINICA C. ANDERSON, ESQ.** **RYAN LOOSVELT, ESQ.** **Duane Morris** **100 North City Parkway** **Suite 1560** **Las Vegas, NV 89106**
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Las Vegas, Nevada; Tuesday, July 3, 2012; 9:31 a.m.

(Call to Order)

(Telephonic and courtroom appearances)

THE CLERK: All rise.

THE COURT: Good morning.

ALL: Good morning.

THE COURT: Please be seated.

THE CLERK: Your Honor, we are now calling the motion hearing in the matter of *Oracle, USA, Inc. versus Rimini Street, Inc.* The case number is 2:10-cv-0106-LRH-PAL.

Beginning with plaintiff's counsel, counsel, please state your names for the record.

MR. HOWARD: Good morning, your Honor. Geoff Howard from Bingham McCutchen on behalf of the plaintiffs, Oracle.

MR. POCKER: Your Honor, Richard Pocker, Boies, Schiller and Flexner, also on behalf of the plaintiffs, Oracle.

MR. ALLEN: Good morning, your Honor. West Allen from Lewis and Roca on behalf of Rimini Street, and on the telephone is Rob Reckers from Shook, Hardy and Bacon as well for Rimini Street.

MS. ANDERSON: Good morning, your Honor. Dominica Anderson, Duane Morris, on behalf of CedarCrestone, and Mr. Ryan Loosvelt. We also have on the phone Mr. Alan Tannenwald.

MR. MAROULIS: And good morning, your Honor. It's

James Maroulis from Oracle for plaintiffs on the phone as well.

THE COURT: All right, Counsel. I have read the moving and responsive papers with the exception of the things that were filed late Friday afternoon during my criminal duty work and I received a flood of papers, not just on this case, but on the other matters I have on calendar today. I have read all of the other moving responsive papers.

Let me take up preliminarily this housekeeping matter. Is there any additional need to address the case management issues the parties raised in the June 29th joint status report? If I understand correctly, you're asking for a modification of the deadline for filing dispositive motions.

MR. UNIDENTIFIED: That's correct, your Honor. An extension of the deadline to file its dispositive motions and a suspension of the pretrial statement filing date until 30 days after the dispositive motions.

THE COURT: All right. And the dispositive motions are currently due when?

MR. UNIDENTIFIED: They're currently due July 31st.

THE COURT: And you're requesting a 30-day extension of that deadline?

MR. UNIDENTIFIED: Correct, your Honor.

THE COURT: (indiscernible) and (indiscernible) local rule applies, so you have 30 days from the decision of dispositive motions in which to file (indiscernible).

MR. UNIDENTIFIED: Thank you, your Honor.

THE COURT: And let me hear now on the merits of the dispute involving the motion to modify the protective order with respect to CedarStone.

Mr. Howard?

MR. HOWARD: Thank you, your Honor.

Your Honor, the issue before the Court is whether it should modify the protective order to allow information that Oracle has now learned in discovery -- specific, identified information -- to protect and enforce its IP rights against CedarCrestone. The Court considers this issue in light of the Ninth Circuit's strong policy in favor of access to collateral litigants to meet their needs in collateral litigation. And there's two issues that the Court considers, two prongs of that test.

The first is the material relevance. There really isn't any dispute about that. I don't think you've seen any contest as to whether this underlying material is relevant. In fact, the vast majority of it is Oracle's code. It's Oracle's software that was produced to Oracle, had been copied, modified, and distributed by CedarCrestone to its customers. So, I don't think that issue is in dispute.

The second is whether there is a reliance interest that outweighs the strong policy favoring access for collateral litigants to meet their needs in the litigation. As to that,

your Honor, I don't think there is really any serious contest either. The protective order that the parties negotiated and entered expressly allows for modification. In fact, at paragraph 17 of the protective order it specifically says that entering into, producing or receiving confidential information, Oracle is in receipt of the confidential information, shall not -- paragraph 17D -- quote:

> "Prejudice in any way the rights of a designating or receiving party to seek a determination by the Court whether any discovery material should be subject to the terms of this protective order."

And, obviously, one of the terms of the protective order is whether you can use the information in a litigation other than this one.

In addition, the law requires a specific showing, a specific and detailed showing, of prejudice based on that reliance, and, of course, there isn't reliance presumed when there is a blanket protective order like this one. And there hasn't been any showing of specific prejudice as to any document; not the testimony that we put before the Court, not the 625 pages of documents that were produced, not the two-gigabyte disk that has our Oracle code on it. There just hasn't been any articulated specific showing of prejudice by CedarCrestone other than the fact that they will be the recipient of an action by Oracle to enforce and protect its IP

rights. But that's not the kind of specific prejudice that's been shown. It's not a trade secret; it's not confidential. Again, it's our code, so it's hard to see how it could be. And they've said that they're at some point in the future shutting this down, so it's hard to see how that could contribute any prejudice to them at all.

And, to the contrary, I would submit to your Honor that there really isn't any better showing of good cause for a litigant to modify the protective order than the circumstances here, where it has now discovered that its partner has been misusing, copying, infringing its IP, and it now needs to, having been unable to resolve that, now needs to stop that and enforce and protect its rights.

Those are the issues that I think are before the Court, and I submit to your Honor that it is a very straightforward and fairly simple application of the Ninth Circuit test.

THE COURT: Thank you, Mr. Howard.

Opposing counsel?

MS. ANDERSON: Thank you, your Honor.

I know your Honor is familiar and has read all the papers, but I think we have to step back and look at how the parties ended up being where they are today. Oracle -- and CedarCrestone is a platinum partner with Oracle -- Oracle comes to CedarCrestone and says, "We need some of your documents to

help us prosecute our case against Rimini." CedarCrestone starts in the discussions; a subpoena is issued. At that point they are looking at potentially quashing -- filing a motion to quash the subpoena. The subpoena goes out; we negotiate over five months over the scope of the subpoena, the production --

THE COURT: Instead of litigating before the Court and getting a determination whether you had to turn over the documents or not.

MS. ANDERSON: That's right. But -- but -- I mean, obviously, the Court's do encourage --

THE COURT: So, both sides relied in --

MS. ANDERSON: That's right.

THE COURT: -- negotiating the protective order about what this Court would do --

MS. ANDERSON: That's right.

THE COURT: -- in terms of whether or not Oracle was going to get the documents and you were going to be required to produce them.

MS. ANDERSON: Right. That's absolutely right, and the parties negotiated instead of coming to the Court, which is what parties should do. But the scope of the protective order was limited to this sense that the documents could be used for purposes of the prosecution of the Rimini action, clearly.

THE COURT: All right. But the point is both sides avoided the determination of whether or not they were relevant

to this action and should be produced and, if so, what the Court would order concerning how to protect the documents that were produced in this case.

MS. ANDERSON: That's right, your Honor. However, we did rely on the terms of the protective order --

THE COURT: Sure.

MS. ANDERSON: -- and stipulated to that effect.

After we signed the protective order and the supplemental stipulation, we began to produce documents. There were approximately three gigabytes of documents produced. Some of those were marked confidential. Only 64 documents or pages were marked highly confidential. Five pages of those are client names. Fifty-nine pages of those are proprietary methodology or code. So, it was a very selective process that CedarCrestone made in analyzing each and every document and marking them in a very specific way.

Then Oracle asked for a deposition, and again CedarCrestone, trying to be helpful, provided a witness under a 30(b)(6). Oracle had that transcript for approximately a month. They designated the entire transcript except for three exhibits as highly confidential. Then they sent it to CedarCrestone, and CedarCrestone said that designation is fine. All along CedarCrestone has been very specific on how they have designated their documents. It hasn't been a blanket everything is protected.

Oracle then says, once we got the documents, we said, "Gee, maybe we have some action against CedarCrestone as well." What's really troubling is in their pleadings, in their motion -- it's at page three -- they say, "Well, we actually started thinking about CedarCrestone either in the TomorrowNow litigation or maybe the latest, at the Rimini answer, when Rimini filed their answer," which is certainly prior to the negotiations on protective order, prior to our production of documents, and clearly prior to the deposition testimony. So, while CedarCrestone -- while Oracle is saying, "We didn't know until after; oops, we kind of stumbled into our findings," their own pleadings counter that.

Now, the Court's asked did we not come to the Court for a ruling. That's true. But one can imagine, when you look at the exhibits, one can imagine how the negotiations would have been very different had Oracle said, "You know, we are thinking that we may have some claim against you; we'd like you to produce documents." Would we have still -- if they had subpoenaed us, would we still have had to produce documents? Maybe. We would have been before the Court; we would have been here on a motion to quash. We certainly would have produced a different probably volume of documents, the protective order would have been different, the negotiations would have been different, the scope of that subpoena that we would have responded to would have ultimately been different. Would we

have produced a witness? Maybe. Maybe if there had been a motion for a protective order on that, perhaps it would have gone forward but on a more limited scope, but the truth is that Oracle basically lulled CedarCrestone into thinking it was helping its platinum sponsor -- or its sponsor, its platinum partner, into prosecuting its case against Rimini.

So, under that, you have to say, "Was CedarCrestone set up?" It has that appearance, that we were lulled into producing the documents under the guise of the Rimini action and now Cedar -- and now Oracle is asking the Court to wholesale lift the protective order so they can use everything against CedarCrestone.

The Ninth Circuit cases that Oracle's counsel cited, clearly that's the test. The problem is in the Ninth Circuit and in any other circuit there is no case anywhere remotely like this. Your typical case is plaintiff -- as I'm sure your Honor knows -- plaintiff versus defendant; those parties are in litigation, they produce documents, a third party says, "I'd like to intervene into the case, obtain those documents for purposes of an already existing, separate litigation."

Oracle relies on the *Fultz* (phonetic) case, which is your Ninth Circuit case, but there the Court found there was no reliance, and there the party who was seeking the documents hadn't drafted the protective order, and there already was collateral litigation. We make the point, obviously, there is

no collateral litigation. So, Oracle says, "Well, the *CBS* case says you can lift a protective order to get documents to file a separate litigation." And that was a different situation, like most cases, where CBS sued defendant, E-T-I-L-I-Z-E. So, those were two parties in litigation; they produced documents under protective order; and then CBS says, "Well, we think we need to sue you in a separate litigation" -- I think it was because of patent rules -- but already the two parties were litigants. So, they had their guard up; they knew what they were producing was already part of litigation.

Here, obviously, we believe that Oracle lulled us into producing documents to help them in their prosecution of Rimini. The reliance is significant. We negotiated over a five-month period. We were incredibly careful about how we designated documents. There was a limitation and use provision or determination in the protective order that could only be used for Rimini, the Rimini litigation. We produced over the three -- the three gigabytes of documents and were very careful how we marked them.

So, the concept that this was a blanket protective order that shouldn't have as much weight as a non-blanket is inappropriate, as well as what -- when I saw that in Oracle's papers, I was surprised because Oracle drafted the protective order. And in the protective order on page two it says, quote:

"Parties acknowledge that this protective order does

not confer blanket protection on all disclosures."

So, again, the party who drafted it is telling us it's not a blanket protective order, we treat it as not a blanket protective order, we spend all of this time very carefully out of three gigabytes just marking a very limited set of documents as highly confidential, and then -- and then this happens.

The case that is closest is a case which we found in looking at the *CBS* case after they filed their reply. And it's called *Avago*, A-V-A-G-O, and I apologize; I have a copy of it if the Court wants it. The citation is 2011 Westlaw 5975243, Northern District of California, November, 2011. Avago Technology sues IPtronics for patent infringement. The parties produce documents pursuant to protective order. When they look at the documents, Avago says, "Aha. You, IPtronics, have been in conspiracy with our own employees." Therefore, they come back to the Court and they ask for a motion -- they file a motion to lift the protective order so that Avago could share the documents with its own employees and permit it to use the evidence in a potential civil litigation. The Court said no.

And they distinguished CBS, and actually Avago has been cited as disapproving of CBS, but they distinguish it saying Avago, one, has not identified with particularity the specific documents it seeks to disclose. Same thing we have here. Two, they highlighted that Avago had not even identified

the specific Avago individuals to whom disclosures were sought, who they would be sharing the documents with. Same thing here. Three, there is no collateral proceedings pending for which the relevance of the disputed information may be evaluated. Same as here.

And the quote from the Court, if I might, your Honor, says, quote:

"Avago has not even provided any specific information regarding the collateral proceedings that it contemplates. All the Court has before it to weigh against IPtronics' legitimate reliance in producing documents are Avago's allegations regarding what it might pursue that are supported by little more than an attorney declaration."

So, the Avago case is as close as you can get on point here. Now, even in Avago you've got litigant versus litigant. And here we're a step -- several steps removed, because we're a third party lulled into producing.

Like Avago, though, we've had -- there is ample evidence of reliance by CedarCrestone in the months of negotiation. I've gone over that. Unlike Avago, though, Oracle has really created this situation, and we believe that based on similar case law Oracle needs to sleep in the contract that it created.

We believe, then, the balancing factors that the

Court must look at -- the strong factors of reliance, the unusual factual circumstance we have here, no pending litigation, Oracle created the situation, everything we've been discussing -- that the Court -- the request of the Court should be denied.

THE COURT: Thank you.

Mr. Howard, this is your motion. You get the last word.

MR. HOWARD: Thank you, your Honor. I'll be brief.

I don't think your Honor heard anything addressed to the two factors that the Court considers under the Ninth Circuit law.

THE COURT: No; she acknowledges that's the two -- that's the two-prong test.

MR. HOWARD: Yeah. And, so, it's conceivably relevant, and there is no specific showing of prejudice. So, the issue is whether an infringer, somebody who has misused confidential information --

THE COURT: Someone you're accusing of misusing.

MR. HOWARD: That's right. We are. But we have -- we have provided the specific details to the Court in the testimony. Whether there is no recourse in those circumstances or whether at least the -- Oracle should be allowed to take action to enforce and protect.

Now, a couple of important points. The discussion

about the blanket designations and what was confidential and highly confidential; I just don't think that's relevant to this motion. Our proposed modification preserves --

THE COURT: Your very motion says the fact that the initial protective order was a blanket protective order is a factor weighing in favor of modifying it.

MR. HOWARD: Yes. But we have -- as the *Fultz* court did, we have proposed that the designations that CedarCrestone has applied to their materials will be preserved in the modified protective order.

THE COURT: Subject to a further motion to modify, because that's what the protective order says.

MR. HOWARD: That's right. And all parties know that when they designate materials pursuant to this protective order one side or the other -- well, anybody can challenge the confidentiality of those materials.

And that was the second point I was going to make, was that the language that counsel read to the Court, the sentence two of the protective order, that's exactly the point it makes. It says that you cannot rely on any kind of blanket protection for any of these materials because the protection that it affords are only -- extends only to the limited information or items that are entitled under applicable legal principles to treatment as confidential. And the legal principles that are applicable here don't apply to keep those

materials confidential within the terms of this protective order. It should be modified to allow use in collateral litigation to meet the needs of the collateral litigant, here Oracle.

Finally, this idea that the protective order was fraudulently induced; those are my words, but that's my paraphrase of the argument that I heard.

THE COURT: You lulled them into producing things.

MR. HOWARD: Yes. We lulled them into producing -- no. Two points; well, maybe three. First, there was a subpoena in the SAP litigation as well. And they know --

THE COURT: This protective order closely follows the protective order that was entered into in SAP.

MR. HOWARD: It's similar.

THE COURT: Uh-huh.

MR. HOWARD: It's similar. By the way, Oracle drafted neither of those. It negotiated at great length both of those with the other parties in the litigation. I don't think that's either here nor there. But they knew what the subject matter of the lawsuit was; they knew what the subject matter of that subpoena was; and they knew what the subject matter of this subpoena was. It was specifically directed -- and it's been presented to the Court -- at their business practices, what they did with the software because Rimini had raised the issue that they were doing the same thing as Rimini

was.

So, the idea that they were lulled in under false pretenses I think just can't be right, and I think, to come back to the issues, this is as best a good cause as you could find to allow modification. They will have defenses perhaps; they will have something to say about the confidentiality of it; but here the issue is simply whether we can, as *Fultz* says, meet the needs of the collateral litigant.

THE COURT: All right. We're not doing point/counterpoint. You did file a motion in the alternative to stay this action, which I will hear briefly from you on that, to stay the order on modification pending the outcome of this case.

Ms. Anderson?

MS. ANDERSON: Well, the allegations by Oracle are that what they're alleging CedarCrestone did wrong is the same thing that what Rimini did wrong. And, so, rather than dealing with the motion before your Honor today and what falls out from that, including that if your order were to be inclined to grant that motion, we would be asking your Honor to stay enforcement of that while we file a motion for reconsideration. Now, obviously, we don't believe it should be modified at all, but that's how serious, you know, obviously, we feel about this. So, we thought, well, if they're prosecuting this case against Rimini and they're alleging it's the same thing, then why not

wait until we see what comes of that?

And one other point, just that on the prejudice point. And I apologize; I should have said this. But the prejudice is clearly not just the lawsuit that they are threatening. Prejudice is that Oracle is a competitor with CedarCrestone in some ways of the business. Now, whether they are wanting to put out of business all of their competitors I don't know. But there is definitely prejudice, the fact that their employees -- and, again, without specificity of who would get to see the documents for what purpose, there is prejudice to CedarCrestone if those documents were produced willy-nilly to anybody within Oracle, beyond the threat of this lawsuit.

Thank you, your Honor.

THE COURT: The motion to modify the protective order is denied. The *Fultz* test is certainly the test in the Ninth Circuit, however, key to the Court's analysis in this case is that there is no pending collateral litigation. And this is a blanket protective order. There was not a determination on a document-by-document basis to determine whether or not individual documents were appropriately designated as discoverable in this case or subject to the protective order governing confidentiality. The Court made no such finding, and it was done to facilitate the parties' discovery exchanges. Both sides entered into a negotiated protective order in order to avoid a judicial determination of whether or not any

particular documents were protected from disclosure and the terms of any protection that the Court might deem appropriate in this case.

At the end of the day, however, Counsel for Crestone -- CedarCrestone, federal discovery is about obtaining the truth. And although there is no currently pending collateral litigation which persuades the Court that there is no need to modify the protective order at this time, the materials that are the subject matter of the motion would appear to be relevant to a determination of future litigation.

Of course, what's involved in this entire case is Rimini's determination that what it does is what everybody else does who performed the same type of function; it's the industry standard, and it's appropriate that it's not protected by Oracle's intellectual property. And that's what this lawsuit will determine, in large part.

But at this time, where there is no collateral litigation, I agree with counsel for the non-party that allowing a modification in the absence of a pending collateral litigation -- and no description of a specific intent to have a specific form of collateral litigation, especially since counsel for the non-party has indicated that shutting this business down to avoid future problems with the potential plaintiff in the case, and it makes no sense at all to modify the protective order, particularly on a wholesale basis. And I

also agree that there is nothing to avoid repetitious or duplicative discovery that wastes either of the parties' resources when there is no pending case.

So, for these reasons the motion for protective order is denied, but counsel for the non-party should be on notice that if and when there is a pending collateral litigation, preliminarily it appears that there is more than good cause to modify the protective order for appropriate documents that demonstrate any infringing conduct.

And I have a 10:00 o'clock. I'm going to call it. Is there any other pending matter that needs immediate resolution on behalf of the litigants in this case, *Oracle versus Rimini*, that I haven't addressed by giving you the relief on the scheduling order?

Mr. Howard?

MR. HOWARD: No, your Honor.

THE COURT: Mr. Allen?

MR. ALLEN: No, your Honor.

THE COURT: All right. Thank you.

MS. ANDERSON: Thank you, your Honor.

(Proceeding was adjourned at 9:58 a.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Signed

July 17, 2012

Dated

TONI HUDSON, TRANSCRIBER